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No. 73-1037

In the
Supreme Court of the United States

PACIFIC INDEMNITY COMPANY,
Petitioner,

v.

ACEL DELIVERY SERVICE, INC., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. .....

In the

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PACIFIC INDEMNITY COMPANY, *Petitioner,*

v.

ACEL DELIVERY SERVICE, INC., et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled cause on October 12, 1973.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is printed in Appendix A hereto, infra, p. A-1. The opinion of that Court on rehearing, handed down on November 23, 1973, which modifies the opinion on original submission, is printed in Appendix B hereto, infra, p. B-1. The original opinion as modified on rehearing is reported at 458 F.2d 1169. The opinion of the United States District Court for the Northern District of Texas, Dallas Division, is printed in Appendix C hereto, infra, p. C-1, and the opinion of that court on motion to reconsider is printed in Appendix D hereto, infra, p. D-1. Those opinions have not been reported.

The opinion of the United States Court of Appeals for the Fifth Circuit on the prior appeal of the temporary injunction ancillary to this suit is printed in Appendix E, infra, p. E-1. The opinion of that Court on rehearing in that prior appeal is printed in Appendix F, infra, p. F-1. Both of said opinions are reported at 432 F.2d 952. The stay order of the United States District Court for the Northern District of Texas, Dallas Division, involved in the prior appeal is printed in Appendix G hereto, infra, p. G-1 and the stay order of the United States Court of Appeals for the Fifth Circuit continuing the stay order of the District Court is printed in Appendix H hereto, infra, p. H-1. Neither of these stay orders were reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 12, 1973;

a timely motion for rehearing was filed and that motion was denied on November 23, 1973. On December 7, 1973, the Court granted a stay, pursuant to 28 U.S.C. 2101(f), of the issuance of the mandate to January 6, 1974, to enable Petitioner to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) Whether Petitioner, who had undertaken the defense of a damage suit against its alleged assured in state court, can be penalized for concurrently litigating in the federal courts, by way of a declaratory judgment action, the question of coverage under its policy and be held estopped on the basis of not exercising diligence in discovering and establishing the non-existence of coverage when those federal courts had issued stay orders prohibiting Petitioner from undertaking any discovery on the question of coverage?

(2) Whether actions taken by Petitioner in a void state court proceeding — void for the reason that the suit was brought against an "estate" which is a non-entity, incapable of being sued — can be the basis of prejudice so as to estop Petitioner from denying coverage under its policy in this federal court declaratory judgment suit?

(3) Whether Petitioner can be estopped to deny coverage under its policy in this federal court declaratory judgment action because it undertook the defense

of a state court damage suit against its alleged assured when, at all times it was so engaged in such defense, it was confronted with the repeated and continuous misrepresentations and falsehoods of all living parties having personal knowledge of the facts of coverage?

(4) Whether Petitioner, in any event, under applicable Texas law, can be held estopped to deny coverage under its policy where coverage for the risk is specifically excluded by the provisions of the policy?

STATUTE INVOLVED

This case involves a necessity for a declaration by this Court of a policy and procedure whereby the rights of parties litigating concurrently in both the federal and the state courts can be clarified, protected and vouchsafed in the federal courts. This necessity is occasioned by this Court's strict construction of 28 U.S.C. 2283, hereinafter set forth verbatim:

> "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

STATEMENT OF THE CASE

This appeal involves at least two basic issues of paramount importance: (1) the right of a party to apply to the Federal Courts for declaratory and ancillary injunctive relief involving a question of coverage under a policy without being penalized for exercising that

right in defending a state court suit against its assured for damages; and (2) the efficacy and effect of a void judicial proceeding in state court involving its assured. The Court of Appeals held that Pacific was estopped to deny coverage of an airplane crash. Prejudice, of course, is an essential element of estoppel and it is the matter of prejudice which gives rise to these two basic issues. The Court of Appeals penalized Pacific for exercising its right to apply to the Federal Courts for declaratory and ancillary injunctive relief for approximately one and one-half years, during which period all parties were obeying the injunction and stay order of the U. S. District Court and the Court of Appeals. That Court likewise held that Pacific's assured was prejudiced by reason of certain actions taken by Pacific in a state court proceeding which was wholly void — void by reason of the fact that the party-defendent in that state court proceeding was an "Estate" which is a nonentity, incapable of being sued.

Jurisdiction of the U. S. District Court of this case is based upon diversity of citizenship, Pacific being a citizen of California and all of the Respondents being citizens of Texas and there being more than $10,000.00 in controversy. 28 U.S.C. 1332.

This suit, seeking a declaratory judgment pursuant to 28 U.S.C., Section 2201, was filed by Pacific Indemnity Company on March 26, 1969, to determine whether coverage exists under its policy of insurance issued to Acel Delivery Service, Inc. with respect to the crash of

a Piper Comanche aircraft near Raton, New Mexico on May 27, 1967. By its original complaint, Pacific also sought a temporary injunction staying, among others, a suit filed jointly in a Texas state court on November 22, 1968, by Sandra Talley, the surviving widow of a passenger killed in the crash, and Walter C. Talley, another passenger, who was injured in the crash.[1] The only defendant named in the Talley's suit was a non-entity, "The Estate of Wendell Williams" (Williams was the pilot of the aircraft and was killed in the crash); no individual defendant was named. After advising the pilot's surviving widow that its investigation of the accident revealed possible coverage defenses, Pacific undertook to obtain from her a reservation of rights and non-waiver agreement. Upon her refusal to enter into such an agreement, counsel for Pacific filed an Answer on behalf of "the Estate" in the state court action on February 10, 1969. Although Pacific's investigation of the crash was then substantially complete, the evidence before it at that time as to coverage was sharply conflicting. The coverage question involved herein was whether a charge had been made for the use of the aircraft, *i.e.*, whether or not the aircraft had been rented. If a rental charge had in fact been made, there would be no coverage because of specific policy exclusions. The former wife of the president of Acel

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[1]Pacific sought to stay two other state court proceedings. One of these was subsequently dismissed, and no stay granted as to it. Although the other was stayed, no question has arisen concerning the effect of Pacific's actions in connection with the defense of that case, and it is no longer material.

had advised Pacific that her husband had rented the aircraft to the pilot at the time of the crash; her husband denied this, and his denial was corroborated by Mr. Clark, the owner of the field at which the aircraft was hangered. They persisted in their denials that this was a rental flight until after Pacific's withdrawal from the defense of the state court suit, when Mr. Clark, on deposition in this declaratory judgment action, admitted for the first time that his previous statements were untrue, and that he had received a check from Williams for the rental of the aircraft. (Clark's deposition was taken on November 18, 1970, approximately one month before the trial of this declaratory judgment action; Acel's president, however, has never admitted his deceit.)

A hearing was held on June 5, 1969, on Pacific's right to a temporary injunction, and on July 18, 1969, the district court stayed further proceedings in the state courts until it could determine the coverage question. The Court of Appeals ultimately vacated the injunction, however, in *Pacific Indemnity Co. v. Acel Delivery Service, Inc.*, 432 F2d 952 (5th Cir., 1970), holding that the temporary injunction of the state court suits was not authorized by 28 U.S.C., Section 2283, under the decision of this Court in *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 90 S.Ct. 1739, 26 L.Ed.2d 234 (1970). On October 8, 1970, within ten days after the judgment of the Court of Appeals was filed herein by the district clerk, counsel

for Pacific withdrew as attorneys for "The Estate" in the state court suit.

This declaratory judgment action was tried during the latter part of December, 1970. But before it could be tried, the attorney who had always been in the state court suit as separate counsel for the Estate of the deceased pilot agreed on October 15, 1970, to waive a jury trial of the state court damage suit, and following if not a collusive, certainly a non-adversary, trial on November 13, 1970, which took only an afternoon, a judgment in excess of $800,000.00 was entered for the claimants in the state court action.

The District Court and Court of Appeals have held in this case that, although no coverage existed under Pacific's policy as to the accident in question, because of the charge made for the use of the aircraft, Pacific is nevertheless estopped to deny coverage as to "the Estate" of the deceased pilot in the Talley's suit by reason of the actions taken by its attorneys in the defense of that state court suit prior to their withdrawal.

REASONS FOR GRANTING THE WRIT

In vacating the temporary injunction granted by the District Court, the Court of Appeals held on the prior appeal of this case:

> "Pacific's Indemnity is not a party to the state court actions against its insured. Moreover, the question of coverage under the policy of insurance will not be litigated in those proceedings. The judgments rendered and the issues decided in the state

court proceedings will in no way impair the federal court's flexibility and authority to decide the question of coverage under the policy.

"Pacific's apprehension, that it may waive its policy defenses if it defends the suits in the state court, furnishes no reason under Section 2283 to stay those proceedings."

And on Petition for Rehearing, it amplified this statement as follows:

"It is ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

"We note, in addition, the appellant's request that our opinion of August 6, 1970, be modified to provide that Pacific shall not be estopped to later deny coverage under the policy by defending the state court action against its assured. As authority for this requested reservation of rights, Pacific cites Dairyland Insurance Co. vs. Frith, 419 F2d 1325 (5th Cir., 1970), which contained language of the same import. In Dairyland, however, the court was exercising its equitable powers under the particular facts of that case. Under the facts presented in the instant case, we do not deem it appropriate to secure to Pacific the requested reservation of rights."

While our dual court system may demand the application of a general rule of non-interference, as announced by this Court in the *Atlantic Coast Line R.R.* case, the preservation of the rights of parties involved in concurrent federal and state proceedings requires the application of a corollary rule: where parties seek in federal court a declaratory judgment and ancillary injunction of state court proceedings, no actions taken

in the state court proceedings should be held to affect or impair the rights of the parties in the declaratory judgment action in the federal court until a final determination has been made by the federal court with respect to the propriety of the injunction. Such a corollary rule should apply *a fortiori* in this case where the Court of Appeals held on the first appeal that, at that time, Pacific could rightfully pursue its coverage defense in the federal declaratory jurgment suit. After that first decision was delivered, Pacific took no further action in the state court proceeding and withdrew from the defense of that proceeding within eight days of the filing of the mandate of that decision with the District Clerk.

The opinion of the Court of Appeals which is the subject of this Petition fails to recognize the basic dilemma which confronted Pacific at the time the Talley's suit was brought in state court, and later when it filed this action for declaratory judgment. Its own policyholder, the president of Acel Delivery Service, had lied to it concerning the circumstances under which Williams had been permitted to use the aircraft covered by Pacific's policy. His falsehood was corroborated by Mr. Clark, the owner of the field at which Acel hangered the plane. Williams, the only other party to the transaction, of course, was dead.

When Williams' widow demanded a defense of the state court action, Pacific sought to do so under a reservation of rights and non-waiver agreement. She

refused to enter into any such agreement. Faced with conflicting information with respect to coverage, Pacific had the right to assume the defense of the state court action without waiving its policy defense. *S.&E. Motor Hire Corp. v. New York Indemnity Company*, 255 N.Y. 69, 174 N.E.65 (1930); *Mistele v. Ogle*, 293 S.W.2d 330 (Mo., 1956). *Sweeney v. Frew*, 318 Mass. 595, 65 N.E. 2d 350 (1945); *Peninsula Insurance Company v. Knight*, 254 Md. 461, 255 A.2d 55 (1969). Pacific was unable to obtain corroboration of the rental of the aircraft until after its withdrawal from the defense of the state court action. If Pacific's assumption of the defense of the state court action was unqualified, as the Court of Appeals has held, it had no alternative under the circumstances and the above authorities but to do so. Pacific then withdrew from the case, when, in view of the opinions of the Court of Appeals on the prior appeal herein, it clearly appeared that any further actions taken in its defense would be at its peril, *notwithstanding the fact that even at the time of its withdrawal, the facts relating to whether a charge had been made for the use of the aircraft had not been clearly established but was a matter on which there was conflicting information.*

The opinion of the Court of Appeals glosses over the clear distinction between the cases cited by it in support of the rule that an insurer which assumes the defense of a case with *knowledge* of non-coverage thereby becomes estopped to deny coverage, and those cited above

where the insurer assumes the defense of a case where faced with conflicting information as to coverage.

Assuming *arguendo* that the Court of Appeals is correct, then every decision which Pacific faced in connection with the state court action was one which was made at its peril. Should it then not also be the case that, under the circumstances, once Pacific filed its action for declaratory judgment in the federal court, all actions taken thereafter by any parties to the state court proceeding should be at the peril of a determination of non-coverage, and the question of prejudice determined only on the basis of Pacific's actions taken in the state court proceeding up until the time of filing its action for declaratory judgment?

Where this done, no prejudice attributable to Pacific's defense of the state court action could be shown. The only steps taken by it prior to March 26, 1969, the date on which this suit was filed, was the filing of an answer and objections to certain interrogatories.

If the opinion in this case stands, there is no way that an insurer, faced with conflicting information as to coverage in connection with a claim brought against an alleged assured, can ever preserve its rights to litigate the coverage question without abandoning the defense of the claim. Having espoused the principle of non-interference with state court actions, this Court should now mold the procedure of the federal system to preserve the collateral rights of the parties.

But even if the Court is unwilling to go so far, it should at least take countenance of the glaring error of the Court of Appeals with respect to its findings as to prejudice. The Court stated:

> "First, Pacific assumed the defense of its insured for two and one-half years[2] and withdrew only a few weeks before trial of the case. By this extreme delay and absence of diligence, the insured has been denied the opportunity to fully investigate and conduct a defense. Second, this finding of prejudice is supported by the apparent conflict of interests that arose when the insurer assumed the defense with doubts concerning coverage and without notifying the insured of the conflict."

As to the first point, the Court found:

> "* * * First, as stated by the district court, Pacific failed to adequately answer plaintiff's interrogatories. The state district court therefore imposed sanctions constituting a $300 fine to cover attorney's expenses incurred to compel further answers. Subsequently, the district court imposed an additional sanction and accepted as true the facts as alleged by plantiff. Appellees' opportunity to investigate the facts while in close proximity to their occurrence has been forfeited. Moreover, the appellee has been deprived of the opportunity to conduct timely pretrial discovery such as propounding interrogatories or taking depositions. * * *"

It should be noted that the sanctions referred to were imposed *after* Pacific's attorneys had withdrawn from the defense of the state court action. There was, appar-

[2]On rehearing, the Court changed this to one and one-half years. Substantially all of this one and one-half years of inaction was occasioned by the injunction and stay orders previously granted by the trial court and the Court of Appeals.

ently, no opposition by the attorney for the Estate to these sanctions, nor did he ever file any answers to the interrogatories in question. To hold Pacific accountable under these circumstances and in the absence of any opportunity to respond to the Motion for Sanctions is unjust.

There is a more fundamental reason, however, why nothing done by Pacific in the state proceedings can constitute prejudice to the Williams Estate; that is, the judgment rendered by the state court was, and is, *void*. The state action was not, like *Phillips v. Teinert*, 493 S.W. 2d 584 (Tex.Civ.App. 1973, n.w.h.), cited by the Court of Appeals, one in which the death of a party occurred after the suit was filed, but rather one in which jurisdiction of the court was wholly lacking from the outset by reason of the fact that the suit was brought against a non-entity, incapable of being sued — "The Estate of Wendell Williams". An "estate" is not a legal entity which may be sued as such; as the Court stated in *Crowe v. DiManno*, 225 F. 2d 652 (5th Cir., 1955): "Rights of action against the estates of deceased persons can only be asserted against the individual or individuals administering the estate." See also: *Camellia Diced Cream Company v. Chance*, 339 S.W. 2d 558 (Tex.Civ. App. 1960, n.w.h.); *Jones v. Klein*, 451 S.W. 2d 788 (Tex.Civ.App. 1970, n.w.h.); *Perry v. Whiting*, 121 S.W. 903 (Tex.Civ.App. 1909, *error ref'd.*); *Neblett v. Butler*, 162 S.W. 2d 458 (Tex.Civ.App. 1942, *error ref'd. W.M.*); *Denman v. State*, 85 S.W. 2d 252 (Tex.

Civ. App. 1935, n.w.h.); *Faulkner v. Reed*, 241 S.W. 1002 (Tex. Com. App. 1922); *Heuschel v. Wagner*, 215 P. 476 (Colo. 1923); and *Behnke v. Geib.* (D.C.Md. 1959) 169 F. Supp. 647. Thus, there is an important distinction between this case and *Phillips v. Teinert.*

In the *Phillips* case, the court had jurisdiction over the parties at the time suit was filed. The cause of action owned by the plaintiff who died after suit was commenced survived in his heirs or personal representatives, and they never became parties to the suit. Therefore, upon reversal of the trial court's judgment, they could be made parties to the suit and the case prosecuted to a valid judgment.

Here, the state court never acquired jurisdiction over any party defendant. Williams, of course, died in the crash which gave rise to these proceedings. The cause of action against him, if any, could only have been asserted against the individual administering his estate, or his heirs or personal representatives. Such persons were never made parties to the state action, consequently, the court there never acquired jurisdiction over any cause of action which the plaintiff could continue upon substitution of the proper parties, whether under Rule 151, Texas Rules of Civil Procedure, upon issuance and service of a writ of scire facias, or otherwise. Because the statute of limitations has now run against the Talley's cause of action, the state court judgment, being void, cannot prejudice William's heirs or personal representatives in any form or fashion. *Stokes v.*

Beaumont, Sour Lake & Western Railway Co., 161 Tex. 240, 339 S.W.2d 877 (1960); *J. G. Boyd's Good House Shops v. General Sec. Serv.*, 483 S.W.2d 826 (Tex. Civ. App. 1972, n.w.h.); Art. 5526, V.A.T.S.

The fine referred to was imposed in the state court judgment. If that judgment was void, the fine cannot be enforced. Similarly, the fact that the state court may have accepted as true certain facts alleged by the plaintiffs therein is meaningless if such proceedings culminated in a void judgement.

Finally, if timely investigation and defense of the state court action by the Williams Estate was in fact foreclosed by Pacific's assumption of the defense — and we categorically deny that this was so — such foreclosure cannot exist abstractly, but must constitute a real operative prejudice. Again, if the state court action was void, the Williams estate has sustained no detriment by Pacific's action. Moreover, the Williams estate was represented by its own separate counsel all along in the state court proceedings.

A void judgment is accurately described in 46 Am. Jur.2d, Judgments, Sec. 49, as follows:

> "A void judgment is not entitled to the respect accorded to, and is attended by none of the consequences of, a valid adjudication. Indeed, a void judgment need not be recognized by anyone, but may be entirely disregarded or declared inoperative by any tribunal in which effect is sought to be given to it. It has no legal or binding force or efficacy for

any purpose or at any place. It cannot affect, impair, or create rights, nor can any rights be based thereon.

"Although it is not necessary to take any steps to have a void judgement reversed or vacated, it is open to attack or impeachment in any proceeding, direct or collateral, and at any time or place, at least where the invalidity appears upon the face of the record. It is not entiled to enforcement and is, ordinarily, no protection to those who seek to enforce it. All proceedings founded on the void judgement are themselves regarded as invalid and ineffective for any purpose.

"In short, a void judgment is regarded as a nullity, and the situation is the same as it would be if there were no judgment. It accordingly leaves the parties litigant in the same position they were in before the trial."

The Texas rule and authorities supporting it are reflected by the following statement in 34 Tex.Jur.2d, Judgments, Sec. 262, as follows:

"A void judgment has been termed mere waste paper, an absolute nullity; and all acts performed under it are also nullities. Again, it has been said to be in law no judgment at all, having no force or effect, conferring no rights, and binding nobody. It is good nowhere and bad everywhere, and neither lapse of time nor judicial action can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived."

Stated otherwise:

"But to be entitled to such sanctity a judgment must be valid. To render it valid in truth and in

> fact the court pronouncing it must have active jurisdiction both of the subject matter of the litigation and of the persons named as defendants. Without both of these prerequisites the court's pronouncement in judgment, though conformed in contents and expression to every legal requirement, is but "sounding brass and a tinkling cymbal." *Maury v. Turner*, 244 S.W. 809 (Tex.Com.App., 1922).

The fact that a court may have potential jurisdiction of the parties and subject matter is not sufficient to vitalize a judgment rendered when its jurisdiction is not legally invoked. *State v. Olsen*, 360 S.W.2d 398 (Tex. 1962). Such a judgment cannot be validated by curative legislation, *Engelman v. Anderson*, 244 S.W. 650 (Tex. Civ.App. 1922, error ref'd.), and is not susceptible of ratification or confirmation. *Easterline v. Bean*, 121 Tex.327, 49 S.W.2d 427 (1932). It may be set aside upon motion of any one of the parties, or upon the court's own motion. *Jones v. Bass*, 49 S.W.2d 723 (Tex.Com.App. 1932). However, a party need not appeal from a void judgment to assert its invalidity, *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823 (1961). The parties to a void judgment cannot, by their acts, lose the right to assail it, *White v. Hidalgo County Water Improvement District No. 2*, 6 S.W.2d 790 (Tex.Civ.App. 1928, n.w.h.), and the failure of a party to object to it does not give rise to an estoppel. *Fortune v. Killebrew*, 86 Tex. 172, 23 S.W. 976 (1893). If a judgment is void it is equally invalid although pronounced by the Supereme Court of Texas. *Stapleton v. Wilcox*, 21 S.W. 972 (Tex.Civ. App.1893, n.w.h.).

Nowhere has a void judgment been better described than in *City of Monroe v. Niven*, 221 N.C. 362, 20 S.E. 2d 311 (1942), where the court stated:

> "A nullity is a nullity and out of nothing nothing comes. Ex nihilo nihil fit is one maxim that admits of no exceptions." (Citing authorities)

It has been held in Texas, therefore, that a purchaser in good faith at a sale conducted in the course of void administration proceedings was not protected, the Supreme Court stating:

> "We are of opinion that both the administrations were void; and, being so, a purchaser at a sale in good faith under the administration is not protected. He could not acquire any title under a void administration.* * *A void judgment cannot bind anyone, and it is well settled it may be collaterally attacked. Lapse of time cannot aid it or give it any force as a judgement. These administrations being nullities, the heirs of Byrne forfeited no right by failing to set it aside, or by delay in suing for the land." *Paul v. Willis*, 69 Tex. 261, 7 S.W. 357 (1887).

Even the consent to the entry of a void judgment has been held not to cut off the rights of the parties who consented to its enry. *Fortune v Killebrew*, supra.

There is yet another respect in which the Court of Appeals' finding of a prejudicial delay is particularly harsh and unfounded. Although there was a lapse of approximately one and one-half years between the date on which Pacific's attorneys filed an answer in the state court action and the date of their withdrawal, all proceedings in the state action were stayed from June 5, 1969 through September 30, 1970, and Pacific was like-

wise stayed from taking any further action with respect to the federal action from July 18, 1969 through September 30, 1970. In fact, the stay order prohibiting all discovery in this declaratory judgment action involving coverage was granted by the District Court on the motion of the Respondents herein (not Pacific) and it was also Respondents who prevailed upon the Court of Appeals to continue that stay order pending the hearing and final decision of that Court on the propriety of the temporary injunction. The holding of the Court of Appeals thusly penalizes Pacific for obeying the stay order of both the District Court and the Court of Appeals.

If temporary injunctions, although erroneously issued, must be obeyed until reversed, *Walker v Birmingham*, 388 U.S. 307, 87 S.Ct. 1824, 18 L.Ed2d 1210 (1967); *Howat v. Kansas*, 258 U.S. 181, 42 S.Ct. 277, 66 L.Ed. 550 (1922), then substantially all of the period of alleged prejudicial delay was a judicial hiatus which must be disregarded.

The Court has also held, however, that prejudice exists here by reason of the conflict of interest which arose when Pacific assumed the defense of the state court action "with doubts concerning coverage and without notifying the insured * * *." The record does not support this conclusion; indeed, it is inconsistent with the following portion of the Court's Opinion on p. 9:

> "The facts, as found by the district court, demonstrate that after Mrs. Williams was served with

> process, she consulted with her attorney. Her attorney forwarded his file to Pacific demanding an unqualified defense on behalf of the estate of Wendell Williams. Pacific responded to this letter, stating that it was its intention not to assume an unqualified defense and to reserve any rights under the policy in order that it might later deny liability. Mrs. Williams' attorney responded to Pacific's letter, stating that 'any further action taken by you with respect to these cases will be with full knowledge of our demands and will be considered by us as an acceptance of these demands."

The Court of Appeals' discussion of the decision in *Employers Casualty Co. v. Tilley*, 496 S.W.2d 552 (Tex. 1973), to which the above statement alludes, is factually inapposite. It appears from the testimony of Joseph H. Erwin, who investigated the crash for Pacific, that Mrs. Williams was represented by an attorney at least a month before the state (liability) action was filed; Erwin spoke with that attorney regarding the case on October 22, 1968. The attorney in question was Norman Darwin; he testified that he was originally employed by Mrs. Williams to determine if her husband "had any liability in the case or if possibly she or the estate had a cause of action", that he investigated that phase of the case, and concluded that she had no cause of action. Before Pacific's attorney filed an answer in the liability action on behalf of the Williams Estate, he advised Mrs. Williams by letter that a possible coverage question existed, mailing a copy of such letter to Darwin. Mrs. Williams was joined as a party in the federal action, which was filed by a separate firm of attorneys within

six weeks after the answer in the state action was filed. In fact, the attorney representing Pacific in the state action had advised Pacific that it had no basis on which to bring a suit to determine coverage, and when Pacific determined to do so regardless of his advice, he recommended that such an action be prosecuted by another firm.

Thus, it simply cannot be said here that Pacific concealed its coverage defense from its alleged insured, or used the confidential relationship existing by reason of its defense of the state court action "to strengthen its position for the filing of the instant suit."

As there was no concealment by Pacific of the possible adverse relationship between it and Mrs. Williams, this is not a case like *Tilley* in which prejudice could be pressumed by reason of Pacific's assumption of the defense in the state court action. Additionally, there can be no prejudice under the *Tilley* concept or any other concept of law for the reason that the state court judgment against the Williams' Estate is a nullity, void and unenforceable at any time, anywhere, and in any court. See cases cited at pp. 16-19, supra.

There is yet another fuundamental reason why the judgment below is fatally erroneous. The Court of Appeals failed to follow Texas law which clearly decrees that coverage cannot be created by estoppel where none exists under the policy. Stated differently, the doctrines of waiver and estoppel are applicable in Texas only as regards conditions and forfeiture provisions of a policy

but are not applicable to remove *exclusions* so as to create coverage for a risk expressly excluded by the policy terms. This is the rule in Texas [*Washington National Insurance Company v. Craddock*, 130 Tex. 251, 109 S.W. 2d 165 (1937); *Federal Insurance Co. v. Forristall*, 401 S.W. 2d 285 (Tex.Civ.App. 1966, *error ref'd., n.r.e.*); *Utilities Ins. Co. v. Montgomery*, 134 Tex. 640, 138 S.W. 2d 1062 (1940); *Great American Reserve Insurance Co. v. Mitchell*, 335 S.W. 2d 707 (Tex.Civ. App. 1960, *error ref'd.*); *Zurich Insurance Company v. Bass*, 443 S.W. 2d 371 (Tex.Civ.App. 1969, n.w.h.); and *Finger v. St. Paul Fire and Marine Ins. Co.*, 423 S.W. 2d 460 (Tex.Civ.App. 1968, *error ref'd., n.r.e.*)] and in the Fifth Circuit [*Reisman v. New Hampshire Fire Ins. Co.*, 312 F. 2d 17 (5th Cir., 1963); *Carnes & Co. v. Employers Liability Assur. Corp. Ltd. of London*, 101 F. 2d 739 (5th Cir., 1939); and *Beck v. Connecticut General Life Ins. Co.*, 456 F. 2d 1040 (5th Cir., 1971) cert. den. 409 U.S. 845, reh. den. 409 U.S. 1093 and 410 U.S. 917]. In *Beck*, the Fifth Circuit expressly held that the doctrines of waiver and estoppel cannot be used to create coverage which was expressly excluded by the terms of the policy and that the federal courts were bound by this state law in diversity cases (see opinion on original submission and on motion for rehearing in *Beck*).

CONCLUSION

This case is one which compels correction by this the highest Court of the land — it contains grossly unconscionable conduct and inequities, issues of nationwide

application and importance, and grievous errors of law.

Pacific was confronted with the repeated falsehoods of the only two living persons who participated in the rental of the aircraft. Those two persons (one of whom was the President of Pacific's insured) repeatedly maintained that no rental charge had been made for the use of the aircraft. Surely, Pacific had the right and obligation to undertake the defense of the state court damage suit in view of these statements. At the very least, Pacific was confronted with conflicting information as to coverage which, under the law, precludes application of the doctrine of estoppel, if otherwise applicable.

It was in view of this conflicting information that Pacific instituted this declaratory judgment action in federal court. Respondents herein obtained stay orders in the U. S. District Court and in the Court of Appeals precluding Pacific from further discovery on the coverage question. Once these stay orders were ultimately dissolved, Pacific promptly withdrew from the defense of the state court proceeding and then began discovery on the coverage question. It was only then that Pacific was able to break the chain of lies and establish that a charge had in fact been made for the use of the aircraft. This break occurred only one month prior to the trial of this declaratory judgment action and *after* Pacific had already withdrawn from the defense of the state court proceeding when Pacific took the deposition of Mr. Clark, the owner of the field at which the aircraft was hangered.

Pacific should not be penalized for pursuing its rights in the federal courts to litigate the coverage question. The nationwide importance of a proper understanding of the rights of parties where there are concurrent federal and state proceedings demands that this Court exercise its jurisdiction and formulate a policy and procedure whereby the rights of parties in such cases are clearly known and protected. Here, Pacific has been penalized for being dilatory in determining the non-existence of coverage when it was enjoined by the federal courts (on Respondent's motion) from any discovery on the matter of coverage. In essence, Pacific has been penalized for obeying a court order obtained by its adversaries.

There can be no prejudice for even a more fundamental reason which demands correction by this Court. All of the alleged prejudice was in connection with Pacific's participation in a void state court proceeding. Nothing is more fundamental to our system of jurisprudence than the principle that a court must have jurisdiction of a case before it can act. Yet, the state court had no jurisdiction of the damage suit against Pacific's alleged assured because that suit was brought against an "estate" which is a non-equity, incapable of being sued. The collusive judgment in the amount of $845,279.45 rendered in the state court after Pacific withdrew is a nullity and, hence, can cause no prejudice no prejudice can ever befall Pacific's alleged assured in to anyone. And, since limitations have long since run,

the premises. Thus, if the Texas law permitted the creation of coverage by estoppel for a risk specically excluded by the policy (which it does not), there can be no estoppel because of the absence of any legally cognizable prejudice to Pacific's alleged assured. This Court must, then, exercise its juristdiction to prevent the application of an anomalous result that actions taken in a void proceeding can be prejudicial even though all of the actions taken in such proceeding, including the judgment itself, are absolute nullities. The importance of the fundamental rule requiring basic jurisdiction before courts can act requires that this Court declare the national policy to be that actions taken in void state judicial proceedings cannot in any event affect rights of parties in the federal courts, directly or by indirection.

For the foregoing reason, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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PROOF OF SERVICE

I, Logan Ford, attorney for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 28 day of December, 1973, I served copies of the foregoing Petition for Writ of Certiorari on Respondents by mailing copies thereof in duly addressed envelopes, with postage prepaid, to their attorneys of record as follows:

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Logan Ford

APPENDIX A

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 72-2118

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellant,

versus

ACEL DELIVERY SERVICE, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

(October 12, 1973)

Before GOLDBERG, AINSWORTH and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: This is a Texas diversity case initiated by Pacific Indemnity Company, seeking a declaratory judgment pursuant to 28 U.S.C. § 2201, as to whether a policy issued by Pacific to

Acel Delivery Service, Inc., covering a Piper Comanche aircraft imposes liability upon Pacific for an accident occurring near Raton, New Mexico. There are essentially two issues that must be resolved: (1) whether the policy provides coverage for the risk involved in the accident, and (2) whether Pacific has waived or is estopped from asserting a defense of noncoverage under the policy because Pacific assumed the defense of a lawsuit initiated in a Texas state court against one claiming coverage under the policy. The district court found that there was no coverage under the policy, but that Pacific was estopped to raise the defense of noncoverage because the insurer had assumed the defense of one claiming policy coverage. We agree with the district court's disposition of this case and therefore AFFIRM.

The events that give rise to this controversy commenced on May 27, 1967. An aircraft owned by Acel Delivery Service Inc., and insured by Pacific Indemnity Company crashed, killing the pilot, Wendell Williams, a passenger, Joe Mack Talley, and seriously injuring the father of the deceased passenger, Walter C. Talley. This action was initiated on March 26, 1969, when Pacific filed suit against Acel seeking a declaratory judgment and an injunction to stay further Texas state court proceedings until Pacific's liability under its policy issued to Acel was determined. The district court granted an injunction on July 18, 1969, but this court subsequently vacated the injunction. *Pacific In-*

dem. Co. v. Acel Delivery Service, Inc., 432 F. 2d 952 (5th Cir., 1970).

Three lawsuits were pending in Texas district courts when this declaratory judgment action was filed. The first suit was brought by the estate of Joe Mack Talley and Walter C. Talley against the estate of Wendell Williams. While Pacific attempted to obtain a non-waiver agrement to preserve its rights on behalf of the estate of Wendell Williams before assuming a defense, it failed to do so. Pacific directed that an answer be filed on behalf of the Williams estate, and consequently the defense was assumed until October 9, 1970, at which time Pacific decided to withdraw. On Pacific's withdrawal, another attorney appeared on behalf of the Williams estate. Less than a month after Pacific's withdrawal the case was tried and judgements were rendered against the estate of Wendell Williams in favor of Walter C. Talley for $94,979.45, in favor of Sandra Talley for $600,000, and in favor of the minor daughter of Joe Mack Talley for $150,000.

A second suit was filed by Edward A. Baker, the owner of the racehorses injured in the accident, against the estate of Wendell Williams and against Acel Delivery Service. Pacific answered this complaint only on behalf of its named insured, Acel Delivery, after obtaining a non-waiver agreement from Mr. Santos, the president of Acel, but not in regard to the estate of Wendell Williams.

A third suit was filed by Acel Delivery against Mrs. Williams as the representative of the estate of Wendell Williams. The state court, however, dismissed this action, and it therefore is not involved in this appeal.

This court must now determine Pacific's liability in these lawsuits based upon the policy issued to Acel covering the aircraft.

I.

The first issue that we must resolve is whether there was coverage of the accident under the insurance policy issued by Pacific to Acel. As an elementary observation, we acknowledge that the coverage provided by the insurance is governed by the policy provisions. The policy states that the aircraft was insured only when used for "pleasure and business," defined as "[p]ersonal, pleasure, family and business uses excluding an operation for which a *charge* is made" (emphasis added).

The appellees contend that the term "charge" is synonymous with the term "profit." Relying primarily on *Houston Fire and Cas. Co. v. Ivens*, 338 F.2d 452 (5th Cir., 1964), the appellees contend that the mere reimbursement for expenses does not constitute a charge within the meaning of the policy. *See also Fidelity & Cas. Co. v. Crist*, 455 S.W. 2d 79 (Ark., 1970); *Thompson v. Ezzell*, 379 P.2d 983 (Wash., 1963). Appellees introduced testimony to the effect that the $10 an hour assessment would barely cover the aircraft's

maintenance and overhead expenses. There was additional testimony that the average rental of a similar Comanche aircraft is $25 to $30 an hour and that a rental for $10 an hour would not be profitable. The appellees' reliance upon these cases is misplaced. The appropriate standard for determining whether a charge was made depends upon the motivating reasons for making the flight. The facts in the *Ivens* case, *supra*, show that the pilot of the aircraft, Ivens, was an equipment salesmen for N. M. Ulsch & Son, working strictly on a commission basis. Ivens agreed to fly a customer, Fletcher, from Jacksonville, Florida, to Knoxville, Tennessee, to procure a piece of equipment. Ivens requested that his passenger contribute toward the cost of the gasoline, and Fletcher agreed to do so because Ivens was not going to receive a commission on this particular sale. Fletcher paid $60 to help pay for the flight expenses. The *Ivens* court held that Fletcher's contribution was not a charge as prescribed in the policy. The court made clear that "when a charge is made for something, there is the distinct connotation that there is a *quid pro quo*. A charge may thus be considered as the price demanded for a thing or service. The agreement of Ulsch was merely the offer of a contribution to help Ivens defray the cost of the gasoline." *Id.* at 455. Fletcher's contribution toward the cost of the gasoline was a purely voluntary gesture. This contribution was not the motivating factor for the flight.

The facts, as found by the trail court, compel a different result in the case at bar. The trail court found

that the pilot of the aircraft, Williams, gave an $84 check to L. E. Clark, the owner and operator of Clark's Flying Service, where the aircraft was hangared, for the use of the aircraft. Clark testified that he expressly discussed with Santos, the president of Acel Delivery, the amount which was to be assessed Williams for the use of the aircraft, fixing the rate at $10 per hour flying time in addition to Williams furnishing all the necessary gasoline and oil. The district court also found that on two prior occasions the aircraft had ben used by other pilots for $10 an hour in addition to the gasoline and oil. On the basis of these factual findings the court held that there was a charge within the meaning of the policy because the payment of the $84 was not a voluntary gesture, but was a motivating factor and a prerequisite to the flight taking place. Accordingly, the flight was not covered by the policy.

We find additional support for this conclusion included within the policy itself. The policy excludes as a charge the sharing of expenses, as in *Ivens*, but narrowly defines the expenses that may be shared as limited to fuel costs and storage fees pertaining to a particular flight. In the case at bar, however, the $10 an hour cost was assessed in addition to the fuel and storage of the aircraft. This excess over and above the cost of fuel and storage can only be regarded as a charge. Based upon these facts we hold that there was a charge made, within the meaning of the policy, for the flight.

II.

Finding that the flight resulting in the accident was not within the coverage of the policy, we must now determine whether Pacific is precluded from raising this defense by the doctrines of waiver or estoppel. It is well settled in Texas that these doctrines will not operate to create coverage in an insurance policy where none originally existed. The reason underlying this rule is that the insurer should not be held liable for a risk which goes beyond the contractual agreement and for which no premium was collected. While waiver or estoppel may preclude an insurer's policy defense arising out of a condition of forfeiture provision, these, these doctrines do not normally operate to prevent the assertion of a defense of noncoverage.*Employers Cas. Co. v. Tilley*, 496 S.W.2d 552,560 (Tex. 1973); *Minesota Mutual Life Ins. Co. v. Morse*, 487 S.W.2d 317, 320 (Tex 1972); *see Beck v. Connecticut General Life Ins. Co.*, 456 F2d 1040, 1041 (5th Cir., 1971); *Travelers Indem. Co. v. Holman*, 330 F2d 142, 144 (5th Cir., 1964); *Washington Nat'l. Ins. Co. v. Craddock*, 130 Tex. 251, 109 S.W.2d 165, 166-67 (1937); *Great American Reserve Ins. Co. v. Mitchell*, 335 S.W.2d 707, 708 (Tex.Civ.App., San Antonio 1960 1960, writ ref'd).

There is an exception to this general rule. If an insurer assumes the insured's defense without obtaining a non-waiver agreement or a reservation of rights and with knowledge of the facts indicating noncoverage, all policy defenses, including those of noncoverage, are waived, or the insurer may be estopped from raising

them. *Ferris v. Southern Underwriters*, 109 S.W.2d 223, 226 (Tex.Civ.App., Austin, 1937, writ ref'd); *Automobile Underwriters Ins. Co. v. Murrah*, 40 S.W.2d 233, 235 (Tex.Civ.App., Dallas, 1931, writ ref'd); 1 A.L.R. 3d 1143 n.6 (1965); *see Rowe v. United States Fidelity & Guaranty Co.*, 375 F2d 215, 221 (4th Cir., 1967); *Stuyvesant Ins. Co. v. R. Leloup Shrimp Co.*, 333 F.Supp. 233 235 (S.D.Tex., 1971). The theory underlying this exception is based upon the apparent conflict of interest that might arise when the insurer represents the insured in a lawsuit against the insured and simultaneously formulates its defense against the insured for noncoverage. For estoppel to prevent the assertion of a defense of noncoverage in accordance with this exception, there must be a showing of prejudice. *See Employers Cas Co. v. Tilley, supra. See also Hartford Acc. & Indem. Co. v. Swilley*, 304 F.2d 213, 216 (5th Cir., 1962); *Gulbeukian v. Penn*, 151 Tex. 412, 252 S.W.2d 929 (1952). As to the application of waiver, the proponent must demonstrate a voluntary relinquishment of a known right. *E.g. Utilities Ins. Co. v. Montgomery*, 138 S.W.2d 1062, 1064 (Tex., Comm. App., 1940, opin. adopted). Because the district court disposed of this case on the basis of estoppel, we are not concerned with the application of waiver in this appeal.

We must now face the particular cases involved in this declaratory judgment action. In determining the appliability of the previously stated exception, we first turn to the circumstances surrounding the initia-

tion and ultimate resolution of the lawsuit filed in the Texas district court by the estate of Joe Mack Talley and Walter C. Talley against the estate of Wendell Williams. For the exception to apply, we must analyze the facts in three respects; (1) whether the insurer obtained an effective non-waiver agreement or reservation of rights under the policy; (2) whether the insurer had sufficient knowledge of the facts upon which to predicate estoppel; and (3) whether there was prejudice to the insured.

First, we hold that Pacific did not obtain an effective reservation of rights or non-waiver agreement. The applicable rule is properly summarized by Appleman as follows:

> "From a practical point of view, the result is as follows: If the insured refuses to sign an agreement of reservation of rights, the insurer must then send him a nonwaiver notice. If he does not dissent therefrom, but permits the insurer to proceed, it is deemed to be protected. But if he refuses to accept a defense under those conditions and so notifies the insurer, then it must elect whether to withdraw or to proceed with the defense, in which latter instance its defenses are waived."

7 A. J. Appleman, Insurance Law and Practice § 4694 n. 32.5, at 547 (1969); *see Great American Indem. Co. v. City of Corpus Christi*, 192 S.W. 2d 917, 919-20 (Tex. Civ.App., San Antonio, 1945, writ ref'd n.r.e.). The facts, as found by the district court, demonstrate that after Mrs. Williams was served with process, she consulted with her attorney. Her attorney forwarded his

file to Pacific demanding an unqualified defense on behalf of the estate of Wendell Williams. Pacific responded to this letter, stating that it was its intention not to assume an unqualified defense and to reserve any rights under the policy in order that it might later deny liability. Mrs. Williams's attorney responded to Pacific's letter, stating that "[a]ny further action taken by you with respect to these cases will be with full knowledge of our demand and will be considered by us as an acceptance of these demands." Accordingly, we hold that Pacific's attempt to unilaterally reserve its rights under the policy is ineffective because an objection was properly made on behalf of Mrs. Williams.

Second, appellant contends that, assuming estoppel may prevent the assertion of noncoverage as a defense, there is no factual basis upon which to predicate an estoppel. During Pacific's preliminary investigation of the Talley suit, it discovered conflicting reports as to whether a charge was made. Clark and Santos said that no charge was made for the use of the aircraft. To the contrary, Mr. Santos's ex-wife stated that a check was received for the flight in question, although she did not know for what purpose the check was given. While Mr. Clark subsequently testified under oath that a check was received from Williams, this information was first revealed in a deposition after Pacific had withdrawn from the defense of the Talley suit. This was two and one-half years after Pacific initially as-

sumed the defense by answering the complaint. Additionally, Santos consistently maintains that no charge was made for the use of the aircraft, but was merely loaned to Williams.

Although the appellant was met with conflicting information, this information was sufficient to require Pacific to make further inquiry into the facts in order to make a more informed decision as to coverage. Alternately, Pacific could rely on the facts as it knew them and make the decision whether or not it would assume the defense. We find no Texas cases holding the insurer liable when it assumes a defense based on conflicting reports discovered during its preliminary investigation, but failed to make further inquiry in an attempt to establish the truth. We feel, however, that such a holding would be consistent with Texas law and the law of this circuit because it is founded upon sound policy considerations. *Jefferson Amusement Co. v. Lincoln Nat'l. Life Ins. Co.*, 409 F.2d 644, 650 (5th Cir., 1969); *Apperson v. United States Fidelity & Guaranty Co.*, 318 F.2d 438, 441 (5th Cir., 1963). For example, *Federal Ins. Co. v. Forristall*, 401 S.W.2d 285 (Tex.Civ.App., Beaumont 1966, writ ref'd n.r.e.), illustrates the proper conduct of the insurer. In *Forristall*, the insurer conducted an investigation, discovered facts sufficient to support noncoverage, and denied coverage without filing an answer for its insured or otherwise assuming the defense of the insured. Had Pacific, after filing the answer, made further inquiry in an attempt to determine whether there was cover-

age and withdrawn within a reasonable time thereafter, we would perhaps draw different conclusions. Under the facts of this case, however, Pacific made the decision to represent the Williams estate when it filed an answer on the estate's behalf and failed to withdraw for two and a half years.

Incredibly, Pacific attempts to justify its withdrawal based upon the statements made by Clark when he was deposed *after* Pacific had withdrawn from the Talley suit. Clark, however, was a crucial witness, being one of no more than three living persons who had direct knowledge of the events that occurred prior to the accident. Yet there is no evidence in the record of any justification for Pacific's not deposing Clark prior to its withdrawal. Significantly, it was the investigator's suspicion from the outset that this flight might have been a flight for which a charge was made and thus in violation of the policy provisions.

Pacific also contends on appeal, as it did in the district court, that Santos and Clark were actively engaged in a conspiracy to conceal material facts. The trial court found that Pacific failed to establish the existence of a conspiracy. These findings of fact find sanction in the "clearly erroneous" rule. F.R.Civ.P. 52(a); *McAllister v. United States*, 348 U.S. 19, 20 (1954); *Chaney v. City of Galveston*, 368 F.2d 774, 776 (5th Cir., 1966).

Consequently, we hold that because Pacific had knowledge of facts to indicate the possible lack of cov-

erage, but through its own lack of diligence failed to make further injuiry to verify these doubts either for or against coverage, such a factual basis is sufficient to support an estoppel. Pacific cannot be allowed to benefit from its own inattentiveness and failure to more fully ascertain the facts over a two and a half year period.

Third, for estoppel to be effective against a defense of noncoverage even where the insurer has assumed the defense, prejudice must be shown to have been suffered by the party contending estoppel. See *Employers Cas. Co. v. Tilley, supra,* at 560. We recognize that Pacific did not pursue the Talley suit to its conclusion, but withdrew from the defense on October 9, 1970, over two and a half years after filing the answer to the complaint. Pacific's untimely withdrawal less than one month prior to trial of the Talley suit, however, certainly does not preclude a finding of prejudice, but compels it. While we do not delineate all the possible projudices that might have arisen as a result of Pacific's conducting the defense, we point out several obvious instances of prejudice. First, as stated by the district court,[1] Pacific failed to adequately answer plaintiff's interrogatories. The state district court therefore imposed sanctions constituting a $300 fine

[1]The district court stated that there were three possible sources of prejudice:

> "1. Mrs. Williams' plea of privilege was waived by filing an answer in Fort Worth; (2) The Estate was precluded from asserting the New Mexico aviation guest statute as a defense because counsel for Pacific judicially admitted in answer to interrogatories that a 'charge'

to cover attorney's expenses incurred to compel further answers. Subsequently, the district court imposed an additional sanction and accepted as true the facts as alleged by plaintiff. Appellees' opportunity to investigate the facts while in close proximity to their occurrence has been forfeited. Moreover, the appellee has been deprived of the opportunity to conduct timely pretrial discovery such as propounding interrogatories or taking depositions. We do not speculate as to precisely how a defense might be pursued had Pacific refrained from assuming its control and management. We are convinced, however, that Pacific's actions deprived the appellees of the opportunity to present a more forceful defense.

In addition to the prejudice resulting from Pacific's two and a half year assumption of the defense and subsequent untimely withdrawal, this case gives rise to a possible conflict of interest as a source of prejudice similar to the conflict so recently condemned by the

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was made for the flight; and (3) Sanctions were imposed on the Estate because Pacific failed to sufficiently answer interrogatories after being warned by the Trial Court."

We specifically rely on the sanctions imposed on the failure to answer interrogatories in finding that the insured suffered prejudice. We therefore need not pass on the prejudicial effect of the other two grounds of prejudice stated by the district court.

The appellants contend that no prejudice can be shown because the judgment of the Texas state court in the Talley suit was against a non-entity. Phillips v. Teinert, 493 S.W.2d 584 (Tex.Civ.App., Houston, 1973, no writ). As explained above, the insured has sustained prejudice from being denied the opportnuity to conduct and fully develop his case. This prejudice has been sustained regardless of whether the judgment entered in the state court was against a non-equity.

Supreme Court of Texas. In *Employers Casualty Co. v. Tilley*, 446 S.W.2d 552, 560 (1973), the Supreme Court of Texas recognized the conflict of interest when an attorney, acting on behalf of the insurer in defending a claim against the insured, simultaneously builds a defense against the insured on the part of the insurer. In *Tilley*, Employers Casualty Co. engaged an attorney to represent its insured, Tilley, in a personal injury suit. During the following eighteen months, the attorney not only performed services in defending Tilley, but also performed services for Employers concerning whether Tilley had coverage under the policy. Categorizing the conflict of interest as violative of public policy, the supreme court held that such an attorney-client relationship simply could not be condoned. The insurer is under an obligation to immediately notify the insured of the conflict of interests. Consequently, where there is a duty to speak, "an estoppel may arise from silence." *Id.* at 560. The court continued and stated that the insurer's failure to notify the insured of a possible conflict of interests "for nearly 18 months can be attributed only to Employers' desire to strengthen its position in preparation for the filing of the instant suit." *Id.* at 561.

As the Texas Supreme Court analyzed *Tilley*, we can only regard Pacific's two and one-half year silence and delay as a period in which it could have strengthened its defense of noncoverage. Pacific was in complete control and management of the defense for this period

of time and apparently failed to notify the insured of the possibility of its developing a defense. Obviously when such a conflict arises, there is the inherent possibility that in the course of the defense facts would be revealed to which the attorney could not close his eyes and that might later be used to assert noncoverage.

Consequently, there are two premises upon which we base an estoppel in this case. First, Pacific assumed the defense of its insured for two and one-half years and withdrew only a few weeks before trial of the case. By this extreme delay and absence of diligence, the insured has been denied the opportunity to fully investigate and conduct a defense. Second, this finding of prejudice is supported by the apparent conflict of interests that arose when the insurer assumed the defense with doubts concerning coverage and without notifying the insured of the conflict. Each of these premises illustrates Pacific's flagrant disregard for the rights of the insured. Based on the facts of this case, we hold that the insured has clearly sustained prejudice as a result of the insurer assuming the defense. The exception to the general principle, that the doctrine of estoppel operates to prevent the assertion of noncoverage, is therefore applicable.

We turn now to Pacific's liability in Baker's suit filed against Acel Delivery and the estate of Wendell Williams. First, as to Acel, Pacific answered the complaint, but not before obtaining a non-waiver agree-

ment. Non-waiver agreements in Texas are normally recognized as valid and enforceable, *New Amsterdam Cas. Co. v. Hamblen*, 144 Tex. 334, 190 S.W.2d 56 (1945); *Provident Ins. Co. v. Ashy*, 139 Tex. 334, 162 S.W.2d 684, 686 (1942), and we find nothing to cast doubt upon the effectiveness of the non-waiver agreement here in question. The non-waiver agreement is valid and the insurer's defense of noncoverage against Acel is preserved.

With regard to the Williams estate, Pacific did not assume its defense in the Baker suit and consequently there are no facts upon which to estop Pacific from asserting noncoverage.

We make clear, however, that the validity of the non-waiver agreement in the Baker suit has no effect on Pacific's liability in the Talley suit. Generally, the right of any injured party to proceed again the insurer under the policy depends upon the insured's right of action against the insurer. The claimant has no greater rights than the insured. *Seguros Tepeyac, S.A., Compania Mexicana v. Bostrom*, 347 F.2d 168, 178 (5th Cir., 1965); 8 J. Appleman, Insurance Law and Practice §4811, at 164 (1962). The rights of the Williams estate in the Talley suit, however, vested under the insurance contract, *American Indem. Co. v. Martin*, 54 S.W.2d 542, 547 (Tex.Civ.App., El Paso, 1932), rev'd in part 84 S.W.2d 697 (1935); *see J. Link & Co. v. Continental Cas. Co.*, 470 F.2d 1133, 1138-39 (9th Cir., 1972), and as a result Santos's signing the non-waiver agreement

will not alter the rights of the Williams estate. While the insurer has preserved its rights against Acel in the Baker suit, Pacific is nontheless precluded from asserting any defenses against the Williams estate in the Talley suit.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-2118

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellant,

versus

ACEL DELIVERY SERVICE, INC., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

ON PETITION FOR REHEARING

(November 23, 1973)

Before
GOLDBERG, AINSWORTH and INGRAHAM,
Circuit Judges.

PER CURIAM: The court, having received a petition for rehearing in the above entitled and numbered cause, modifies its opinion of October 12, 1973, by delet-

ing all references to "two and one half years" delay, made in reliance on the district court's opinion, and substituting "one and one half years" wherever said phrase appears in the opinion.

In all other respects the petition for rehearing is DENIED.

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

PACIFIC INDEMNITY COMPANY

vs.

ACEL DELIVERY SERVICE, INC.; ALBERT SANTOS; SANDRA TALLEY, Administratrix of the Estate of Joe Mack Talley, Dec'd.; WALTER C. TALLEY; MRS. SHIRLEE WILLIAMS SINGER, Heir and Personal Representative of the Estate of Wendell A. Williams; EDWARD L. BAKER, JR., and L. E. CLARK

CA 3-3079-C

MEMORANDUM OPINION

This is a suit for declaratory judgment brought pursuant to the provisions of 28 U.S.C.A. §2201 by Pacific Indemnity Company seeking a determination whether its policy No. AH-4-3795 issued on December 2, 1966, to Acel Delivery Service, Inc., and covering a 1962 Piper PA-24 Comanche aircraft (Comanche), afforded coverage for an accident which occurred on May 27, 1967, near Raton, New Mexico.

The following facts have been established. The Comanche was owned by Acel Delivery Service, Inc., which was the named insured under aviation policy number AH-4-3795 issued by Pacific Indemnity. Albert

Santos, President of Acel Deliver Service, gave L. E. Clark, of Clark Flying Service, who was hangering the aircraft when not in use, permission to allow Wendell Williams to use the Comanche for a proposed trip to New Mexico. It was agreed that Williams would pay $10.00 per flight hour for the use of the aircraft as well as furnish the gasoline and oil required for the trip. Williams gave Clark a check for $84.00 as a deposit for the flight and proceeded on the trip.

On May 27, 1967, the airplane piloted by Williams crashed at Raton, New Mexico. Williams and Joe Mack Talley, a passenger, were killed. Another passenger, Walter Talley, survived the crash but sustained serious injuries. The airplane crashed into some barns at Raton causing property damage, as well as killing and injuring some horses. A person on the ground was also injured.

Subsequently, two suits were filed as a result of the crash. The first suit was filed in the State Court in New Mexico by George and Josephine Edmondson against the Estate of Joe Mack Talley, Deceased, and Acel Delivery Service, Inc. Thereafter, on November 22, 1968, Sandra Talley, Administratrix of the Estate of Joe Mack Talley, and Walter Talley filed suit in Fort Worth, Tarrant County, Texas, against the Estate of Wendell Williams to recover for the wrongful death of Joe Mack Talley and the personal injuries of Walter Talley.

Service of process was obtained on the Estate of Wendell Williams by serving Mrs. Shirlee Williams, the

community survivor. Norman Darwin, attorney for Mrs. Williams, forwarded the file to Pacific on January 27, 1968, and requested an unqualified defense. By letter dated February 7, 1969, Pacific advised Mrs. Williams of its decision not to assume an unqualified defense but to reserve its right to deny liability if policy defenses existed.

Norman Darwin replied on February 11, 1968, that "Any further action taken by you with respect to those cases will be with full knowledge of our demands and will be considered by us as an acceptance of these demands."

An answer was filed on February 10, 1968, by Attorney Lucian Touchstone, at the direction of Pacific, on behalf of the Estate of Wendell Williams. Pacific continued to defend the Williams' Estate until October 9, 1970, when a motion to withdraw was granted by the Trial Court.

The present suit was filed on March 26, 1969. This Court granted an injunction staying the State Court proceedings until this suit was resolved. The injunction was vacated by the Court of Appeals for the Fifth Circuit in *Pacific Indemnity Company vs. Acel Delivery Service, Inc., et al,* 432 F.2d 952 (5th Cir. 1970).

The insurer, Pacific Indemnity Company, contends that the policy issued to Acel on the Comanche does not afford coverage for the accident in question for the following reasons: (1) That Acel had rented the airplane to Wendell Williams in violation of the renter

pilot provision of the policy; (2) That Wendell Williams was not a properly qualified pilot within the terms of the "Pilot Warranty Clause" of the policy because he did not have a minimum of 300 hours of logged solo or pilot in command flying time, including at least 100 hours in an aircraft of a comparable or more complex type; (3) That a charge was made for the use of the aircraft; and (4) That Albert Santos, acting for Acel, and others misrepresented the material facts and circumstances surrounding the aircraft's use.

The Defendants, on the other hand, deny a charge was made for the aircraft's use or that Williams was unqualified under the policy provision. They assert that Pacific Indemnity has waived or is estopped to assert any coverage defense against the Estate of Wendell Williams because of its assumption of the Estate's defense in the Tarrant County suit without a reservation of rights.

The first question this Court must resolve is which party must bear the burden of proof in an action for declaratory judgment. The import of this decision lies in the fact that Pacific has alleged a violation of item 10 of the policy, which is a declaration of the insured that the aircraft will be piloted only by a properly certificated pilot with a minimum of 300 logged hours of solo or pilot in command flying time and a 100 hours in aircraft of a comparable or more complex type.

Accurate proof of Williams' pilot qualifications is impossible because the log book was destroyed in the

crash. The only evidence of his logged hours is gleaned from Williams' medical records[1] and the testimony of Mrs. Williams and Albert Santos. The medical records reflect that on March 18, 1966, Williams had logged 215 hours. Mrs. Williams testified that she could document only 30 hours from March 18, 1966, until the date of the accident, although she stated that, in her opinion, her husband had flown sufficient hours to qualify.

The general rule of law is that

> "The plaintiff must sustain the burden of proof, or in other words, the plaintiff must bear the risk of non-persuasion of his prima facie case..." 6 A *Moore, Federal Practice* §57.31, at 3155 (1966).

It is advanced in *Moore* that this rule should be equally applicable in declaratory judgment actions, reasoning that

> "...generally it is reasonable and fair that one who brings another into Court should have the burden of proving the prima facie elements of his asserted claim... Since no policy or technical considerations dictates a change in the general rule, we believe that in these cases [declaratory judgments] the plaintiff should bear the usual burden of proving his prima facie case."

The preceding statements from *Moore* are qualified in a following subsection.

> "The Court has held (*Cities Service Oil Co.*, (1939) 308 U. S. 208) that burden of proof is substantive for the purposes of *Erie*. In a federal de-

[1]On an application for a medical certificate, which is required by the FAA in order to continue flying, Williams stated he had 215 hours.

> claratory action, burden of proof as to a non-federal matter is to be determined by the rule of the forum state in similar declaratory actions." 6 A *Moore, Federal Practice* §57.31(3), at 3159 (1966).

The Texas rule in regard to burden of proof in a declaratory judgment action is uncertain because the Texas Supreme Court has not ruled on this question and the Courts of Civil Appeals have rendered conflicting decisions on this point. Plaintiff cites *Schwab v. Ranger Insurance Company*, 438 S.W.2d 121 as the Texas rule while the Defendants argue that *Republic Casualty Co. v. Obregon*, 290 S.W.2d 267 (1956) is controlling. Both cases involve declaratory judgment suits to determine whether policies issued to assureds afforded coverage.

In *Schwab* the insurer pleaded no coverage existed under the policy because the pilot did not have the total minimum number of logged hours (1,000) or the minimum logged hours in a multi-engine aircraft (250), as specifically required by the policy. The Court noted the insured should bear the burden of proof;

> "Ranger having plead the exclusion under the policy pertaining to the qualifications of the pilot, Schwab was obligated either to introduce evidence to prove, and secure a jury finding, that the pilot was qualified under the terms of the policy, or, to introduce evidence to prove, and secure jury findings, that the plane was converted by Paskie." 438 S.W.2d at 123.

The Court relied on the following language from *Dealers Mutual Insurance Co. v. Berglund*, 393 S.W.2d

309, 311 (Tex.Sup. 1965) as authority for this conclusion:

> "Here the insurance company pleaded specific exclusions which were set forth in the policy and thus raised issues of contract coverage. The burden of producing evidence to demonstrate that their losses were not attributable to the pleaded excluded hazards rested upon respondents [assureds] ..."

However, *Dealers Mutual Insurance Co. v. Berglund* did not involve a declaratory judgment action. Plaintiff also relies on the rationable pronounced in the case of *Travelers Ins. Co. v. Greenough*, 88 N.H. 391, 190 Atl.129 , in support of its position. The Court, in holding that the insured had the burden of proof, reasoned,

> "If the proceeding to determine the insurer's liability were one brought against it, the general burden of proof would rest upon its adversary. It would be on the defensive, and a case against it would require a balance of proof to warrant a judgment against it. It is no less on the defensive here. Whatever the form of the proceeding, and notwithstanding its nominal position as a plaintiff, the real situation is that it is defending against a claim of its liability. The relief it seeks is primarily to have the claim adjudicated. Its position that the claim is without merit is necessary, in order to show that the claim is a controverted one. By instituting the litigation it compels the claimant to take action in assertion of his claim. He is required to establish it to entitle it to validity. The plaintiff does not prevail unless the claim is defeated, but the claim is defeated if it is not proved, and it is for the claimant to furnish the proof.
>
> "This view is thought to be just and fair. A contrary one would place the plaintiff in a position of

> undue disadvantage. Having the right to an adjudication of the claim without waiting for the claimant to institute legal proceedings, it ought not to suffer and to have to pay a price by exercising its right. No commendation of justice is preceived in making the plaintiff worse off by seeking a disposal of the contentions between it and the claimant than by awaiting litigation commenced by the latter. This particularly applies to a case like that here presented."

Although the argument advanced by Plaintiff is persuasive, the Court is of the opinion that the Plaintiff, under these particular facts, should bear the burden of proof.

Republic Casualty Company v. Obregon (supra), a decision of the Waco Court of Civil Appeals, is in accord with the general rule expressed in *Moore*. In *Republic* the insurer instituted a declaratory judgment suit seeking a declaration of non-coverage and alleged that the accident was a result of an excluded risk. In affirming the judgment that there was coverage, the Court ruled that the burden of proof on the question of coverage was on the insurer.

> "Further, it must be remerbered that plaintiff brought the suit asking for a declaratory judgment that it was not liable on the insurance policy it has issued to Obregon. It was plaintiff who alleged that Reimundo Carrello was not an employee of Obregon at the time of the accident and it was incumbent on plaintiff to prove such allegation by a preponderance of the evidence." 290 S.W.2d at 269.

See also Evans v. General Insurance Co. of America, 390 S.W.2d 818 (Dallas Civ. App. 1965);

and *Mass. Mut. Life Ins. Co. v. Smith*, 194 F.2d 1006 (5th Cir. 1952).

The burden of proof in declaratory judgment actions is determined largely by the pleadings and the issues presented. *Pacific Portland Cement Co. v. Food Machinery & Chemical Corp.*, 178 F.2d 541 (9th Cir. 1950). A review of the pleadings and the issues presented shows that Pacific is seeking affirmative relief in this case.[2]

By asserting this claim Pacific has assumed the burden of proof and, thus, must fail in its effort to prove that Williams was not qualified.

Plaintiff further argues that the policy does not afford coverage because a "charge" was made for the use of the airplane. Policy Number AH-4-3795 was issued to

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[2]Pacific seeks to hold Acel Delivery Service, Inc., liable for satisfying a note owed by Acel to Texas Bank and Trust for the balance due on the Comanche. Pacific asserts that liability of Acel is established by the "Breach of Warranty Endorsement", which states in pertinent part,

> "3. Whenever the company shall pay the Lien-Holder any sum for loss or damage under this policy and shall claim that, as to the insured or owner, no liability therefor existed, the company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the Lien-Holder against the insured or owner and in and to all the property held as security for the indebtedness; or the company may, at its option, pay the said Lien-Holder the whole amount due or to become due from the insured or owner, with interest, and shall thereupon be entitled to receive a full assignment and transfer of all the rights of the said Lien-Holder against the insured or owner and of all property held as security for the indebtedness."

It is undisputed that Pacific paid off the lienholder, Texas Bank and Trust, in the sum of $12,093.50. Pacific now seeks the sum of $12,093.50 plus interest and 15% of the balance due for attorney fees for collecting the note. Pacific must establish no coverage existed under the policy in order to prevail on this issue.

Acel Delivery Service, Inc., and insured the policyholder against losses occurring while the aircraft was being flown for "Pleasure and Business" purposes.[3]

The term "charge" was defined in *Houston Fire & Casualty Ins. Co. v. Ivens*, 338 F.2d 452 (5th Cir. 1964), a case involving an identical provision with the one now before this Court for consideration, as

> "... a *quid pro quo*. A charge may thus be considered as the price demanded for a thing or service." 338 F.2d at 455.

In the *Ivens* case, Ivens, the pilot of the aircraft at the time of the crash, was the named assured under the policy and his passenger, Fletcher, was a customer of N. M. Ulsch & Son, Inc., whose products Ivens sold as an independent contractor. Ivens had flown Fletcher to Tennessee to pick up a piece of equipment which Fletcher had purchased from Ulsch before Ivens began to represent the company. The testimony of Ulsch's president established that, at Iven's request, he offered to pay $60 to defray the cost of gasoline used in the flight.

In holding that a charge was not made for the flight, the Court *evidently* based their decision primarily upon the fact that the offer of the $60 was a voluntary gesture which Ulsch was under no obligation to make. It was merely an offer to share expenses.

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[3] "Pleasure and Business" is defined in the policy as "Personal, pleasure, family and business uses excluding any operation for which a charge is made." See Plaintiff's Ex. #1.

However, in the case at bar, the evidence[4] shows that Williams agreed with L. E. Clark to pay Albert Santos $10 per flight hour for the use of the Comanche and furnish the gasoline required for the flight. The money appears to have been the motivation for the agreement. It was the thing demanded for the use of the airplane. The Court, giving the term "charge" its ordinary meaning, finds that a charge was made for the flight. Defendants' contention that *Ivens* is authority for the proposition that a profit must be made for the use of the aircraft in order to constitute a charge is erroneous.

Although it appears Pacific had a defense to liability on the policy, the Court finds that Pacific, by defending the Wendell Williams' Estate without a reservation of rights agreement, has waived its defenses and should be estopped to assert them at this time.

The general rule regarding waiver and estoppel is stated as follows:

> "The general rule is this: a liability insurer, by assuming the defense of an action against the insured, is thereafter estopped to claim that the loss resulting to the insured from an adverse judgment in such action is not within the coverage of the policy, or to assert against the insured some other defense existing at the time of the accident." 38 ALR.2d 1151.

This rule is clearly applicable to the case at bar.

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[4]The testimony of Loretta Santos and L. E. Clark reveals that Clark was given a check for $84 by Williams for the use of the Comanche. Clark further testified that Santos was informed of the agreement.

On two previous occasions the same Comanche had been used with the individuals paying $10 per hour and furnishing gasoline.

Pacific had the benefit of a fairly extensive investigation of the facts and circumstances surrounding the crash in question prior to filing an answer for the Estate of Wendell Williams. Joseph Erwin, investigator for Pacific, testified he was suspicious from the very beginning that Williams was not qualified and the flight was a rental flight.[5]

These suspicions were sufficiently strong by February 14, 1968, to compel Pacific to request from Mr. Manning, attorney for Acel Delivery, a non-waiver agreement before it would defend Acel in the New Mexico suit.[6]

Pacific refused to defend the suit after Acel declined to execute the non-waiver agreement. Around June 25, 1968, Erwin received a letter from Loretta Santos in which she stated that the aircraft had been rented and a charge received for the flight. This was a confirmation of Erwin's earlier suspicions. Thus, it appears that Pacific was possessed with sufficient facts to indicate the existence of probable policy defenses.

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[5]See Erwin Deposition, page 23, 35-36.

Erwin was shown the check for $84.00, made payable to Clark Flying Service, by Mrs. Williams the week of June 8, 1967.

See also Letter dated December 1, 1967, from Joseph Erwin to Albert Santos which states that company was of the opinion that the policy did not afford coverage because Williams was not qualified.

[6]The non-waiver agreement provides in part that

> "Whereas, the Insurer contends that the named insured failed to comply with certain requirements of the policy and operated the aircraft in violation of the Uses and Pilot Warranty Provisions provided in the Declarations of the policy, and
>
> Whereas, it appears questionable as to whether or not there is coverage available..."

In spite of these facts, Pacific assumed the defense of the Estate of Wendell Williams by filing an answer on February 10, 1968. As previously pointed out, Pacific sought a reservation of rights agreement from Mrs. Williams but was refused. Pacific continued to defend the suit even though Norman Darwin, attorney for Mrs. Williams, took the position that a continued defense would constitute a waiver of any defenses.

There is a split of authority whether an insurer, in order to protect possible policy defenses, can unilaterally reserve its rights by merely notifying the insured or must obtain a signed reservation of rights agreement. It appears that under Texas law the insurer must get a signed agreement. In *Great American Indemnity Co. v. City of Corpus Christi*, 192 S.W.2d 917 (1945), the rule was stated that

> "The unequivocal denial of all liability to pay a loss under its insurance policy, in the absence of a special contract with the assured, disqualifies the insurance company from defending a suit against the assured for the recovery of damages which the insurance company says is not covered by its policy. The insurance company and the assured may enter into a special contract relating to the defense of a claim asserted against the assured by a third party, based upon the premise that the liability of the insurance company is doubtful or not admitted, but after an absolute and continued assertion of non-liability, the assured is not required to accept such a contract, *American Fidelity & Casualty Co. v Williams*, Tex.Civ.App., 34 S.W.2d 396, writ refused, and may treat the denial of "liability as a breach of the insurance contract and proceed to defend the claim by securing the services of attorneys of its

> own selection, . . ." 192 S.W.2d at 919. *See also* 7 A.Appleman, *Insurance Law and Practice*, §4692, page 520; and *Highway Insurance Underwriters v. Griffith*, 290 S.W.2d 950 (Austin Civ.App. 1956, N.R.E.).

After Pacific's request for a non-waiver agreement was refused, it had the duty to either to refuse a defense and rely on its policy defenses or enter into an unconditional defense.

The old adage that "no man can serve two masters" is applicable here. Pacific made its election to proceed and is now estopped to deny liability.

An essential element of estoppel is that the defense must be prejudicial to the assured. Here, prejudice to the assured is found. The Estate of Wendell Williams was prejudiced by the actions of Pacific in the following ways: (1) Mrs. Williams' plea of privilege was waived by filing an answer in Fort Worth; (2) The Estate was precluded from asserting the New Mexico aviation guest statute as a defense because counsel for Pacific judicially admitted in answer to interrogatories that a "charge" was made for the flight; and (3) Sanctions[7] were imposed on the Estate because Pacific failed to

[7]Pacific failed to adequately answer interrogatories propounded by the Plaintiff even though advised by the Trial Court that it would impose sanctions if Pacific did not make further answers to interrogatories. Accordingly, in May of 1969 the Court ordered the Estate of Wendell Williams to pay a $300.00 penalty to cover the expenses of the Plaintiff's counsel in instituting the Motion to Compel Answers to the Interrogatories. In addition, the Court entered an order on November 13, 1970, granting Plaintiff's Motion for Sanctions, accepting as true the facts alleged by the Plaintiffs. This Order was very prejudicial because it deprived the Estate of Wendell Williams of any opportunity to successfully defend the liability aspects of the case.

sufficiently answer interrogatories after being warned by the Trial Court.

One of the most obvious conflicts in Pacific's continued defense of the Williams' Estate is demonstrated by Pacific's answer to interrogatories that a charge was made for the flight. This answer was made on April 30, 1969. At that time Pacific seems to have had sufficient information to positively and unequivocally make the answer that "a charge was made for the flight", which is one of the policy defenses which it now so vociferously urges. However, Pacific did not withdraw from the suit until October 9, 1970.

Pacific contends that Williams' Estate was not prejudiced because the judgment against the Estate is void since the proper representative of the Estate was not before the Court. It is to be recalled that the Talleys brought their suit against "the Estate of Wendell Williams" and citation was served upon Mrs. Shirlee Williams who was the only representative of the Estate then living. It is also to be recalled that Pacific's attorneys filed an answer on behalf of "the Estate of Wendell Williams" and at no time was any type of pleading filed questioning the Estate's "legal capacity to be sued", which is required by Rule 93 of the Texas Rules of Civil Procedure. By filing a general denial without a verified denial of the Estate's legal capacity to be sued Pacific has waived that defense. *See Vaughan v. Renshaw*, 411 S.W.2d 57 (Waco Civ.App. 1967). Pacific continued representation of Williams' Estate for more than two

and one-half years and never raised the defense it now asserts. It is now precluded from asserting it.

As final defense to their actions, Pacific asserts Santos violated the cooperation clause of the policy by misrepresenting that a charge was not made for the use of the aircraft. In *Commercial Credit Corp. v. Sorgel*, 274 F.2d 449 (5th Cir. 1960), the Court said:

> "Fraud is never presumed, and the burden is on [the party asserting it] to prove it with reasonable certainty by a preponderance of convincing evidence." 274 F.2d at 453.

Pacific has not established a conspiracy to conceal material facts. It is the Estate of Wendell Williams that claims coverage under the policy in question and there is no claim by Pacific that the Estate of Wendell Williams violated the cooperation clause of the policy. The defense of violation of the cooperation clause of the policy is without merit.

In summary, the Court is of the opinion that Plaintiff Pacific has waived any defenses that it might have had under the policy in question and, furthermore, is now estopped from asserting any defenses thereto.

Defendants' attorneys are requested to prepare and submit appropriate judgment.

This Memorandum Opinion will constitute Findings of Fact and Conclusions of Law pursuant to 52(a) of the Federal Rules of Civil Procedure.

SIGNED and ENTERED this 30th day of December, 1971.

/s/ W. M. TAYLOR, JR.
United States District Judge

APPENDIX D

IN THE UNTED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

PACIFIC INDEMNITY COMPANY

vs.

ACEL DELIVERY SERVICE, INC.
ALBERTO SANTOS; SANDRA TALLEY,
Administratrix of the Estate
of Joe Mack Talley, Dec'd.;
WALTER C. TALLEY;
MRS. SHIRLEE WILLIAMS SINGER,
Heir & Personal Representative
of the Estate of Wendell A.
Williams; EDWARD L. BAKER, JR.,
and L. E. CLARK

CA 3-3079-C

MEMORANDUM ORDER

On December 30, 1971, this Court entered its Memorandum Opinion in the above styled and numbered cause. Subsequent to entry of the Memorandum a Motion to Reconsider was filed by Pacific Indemnity Company. After considering the points raised in Pacific's Motion to Reconsider, the Court is of the opinion that the Motion to Reconsider is without merit except with respect to the liability of Acel Delivery Service, Inc.

By non-waiver agreement Acel did consent to Pacific's entry into the case without waiving possible de-

fenses. Pacific did pay off the balance of the indebtedness due on the aircraft in question to Texas Bank and Trust Company. Under the policy Pacific became subrogated to the amount paid to the bank which also assigned the chattel mortgage and note to Pacific. The note is executed by Acel Delivery Service, Inc., and by A. Santos personally. Pacific is therefore entitled to judgment against Acel and Santos in the amount of $12,093.50 plus 15 per cent of that amount as attorneys' fees, plus interest at the rate of six per cent per annum from August 18, 1967, the date that Pacific made payment to the bank. *See* 53 T.J. 2d 481 (Subrogation §63).

Judgment for Pacific against Acel and Santos will be entered accordingly, and Pacific's Motion to Reconsider is in all other respects denied.

SIGNED and ENTERED this 5th day of April, 1972.

/s/ W. M. TAYLOR, JR.
United States District Judge

APPENDIX E

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28323

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellee,

versus

ACEL DELIVERY SERVICE, INC., et al.,
Defendents-Appellants.

Appeal from the United States District Court for the Northern District of Texas

(August 6, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

INGRAHAM, Circuit Judge: On May 27, 1967, a Piper Comanche aircraft crashed at Raton, New Mexico, killing the pilot, Wendell Williams, and a passenger, Joe Mack Talley. Another passenger, Walter C. Talley, was seriously injured. The aircraft was owned by the Acel Delivery Service, Inc. and was insured by the Pacific Indemnity Company.

On May 13, 1968, suit was filed by George and Josephine Edmondson against Acel Delivery Service, Inc., and the Estate of Joe Mack Talley, in Cause No. A33,991, in the District Court of Bernalillo County, New Mexico. These plaintiffs were damaged when the aircraft crashed into a barn they were occupying. Pacific took over the defense of Acel after obtaining a non-waiver agreement reserving its rights to later deny coverage. However, it refused to defend the Talley Estate.

On November 22, 1968, the estate of Joe Mack Talley and Walter C. Talley filed suit against the estate of the pilot, Wendell Williams, in Cause No. 54709-C in the 96th District Court of Tarrant County, Texas. Pacific filed an answer on behalf of the pilot's estate and has taken over the defense without obtaining a non-waiver agreement.

On March 26, 1969, Pacific filed suit against Acel, the Talleys and others, in the court below seeking a declaratory judgment and an injunction enjoining the further prosecution of all state court suits growing out of the above crash except the suit pending in the New Mexico court.

On July 18, 1969, the court below granted an interlocutory injunction in accordance with Pacific's request. The Talleys have appealed from this injunction restraining them from prosecuting their state court suit against the pilot's estate.

The sole issue presented on appeal is whether a federal court, in a suit for declaratory judgment to determine whether coverage existed under a policy of aviation insurance, was precluded by 28 U.S.C. §2283 from enjoining state court actions against the purported assureds "in aid of its jurisdiction", when such persons have refused to permit the insurer to defend them under a reservation of rights or non-waiver agreement.

The federal Anti-Injunction Statute, 28 U.S.C. §2283, provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

At the outset, we note, as this court did in *Tampa Phosphate R.R. v. Seaboard Coast Line R.R.*, 418 F.2d 387, 392 (5th Cir. 1969), cert. denied, 397 U.S. 910 (1970), "[T]hat §2283 applies irrespective of whether the federal injunction is directed to the parties [as here] or to the state courts."

Pacific Indemnity does not argue that there is express congressional authorization for an injunction in this type of action and we are in accord with that conclusion. Neither is it urged that the injunction was required to "protect or effectuate a judgment of the district court. Rather, Pacific maintains that the injunction entered by the court below was "necessary in aid of its [the court's] jurisdiction." 28 U.S.C. §2283.

While the purpose and function of §2283 has been drawn in question, we do not feel disposed, on the facts of this case, to explicate the history and background of a section which is already the subject matter of a plethora of decisional law in this and other circuits as well as in the Supreme Court.

The language of §2283 is explicit in defining the circumstances in which a federal court may stay proceedings in a state court; however, certain timeworn judicially declared exceptions do exist. Thus, it is said that where the jurisdiction over the proceedings is *in rem* or *quasi in rem*, "[T]he state or federal court having custody of such property has exclusive jurisdiction to proceed." *Donovan v. City of Dallas*, 377 U.S. 408, 412 (1964). And more recently, *in personam* proceedings (criminal), instituted in state tribunals, have been stayed by federal courts — the equitable restraints being predicated on the constitutional imperative of freedom of speech. *See, e.g., Sheridan v. Garrison*, 415 F.2d 699 (5th Cir. 1969), cert. denied, 396 U.S. 1040 (1970). Absent a *res* to be preserved and protected or the need for immediate vindication of first amendment rights, the federal courts have been hesitant to expand, by judicial improvisation, the exceptions Congress has created to the general prohibition of §2283.

In the instant case, Pacific has denied coverage under the policy on several grounds, one of which being that the pilot of the aircraft was not properly qualified

as required by the policy provisions. Pacific argues that in the absence of a stay of the proceedings now pending in state court, it must either waive its policy defenses or deny coverage and lose control of the litigation. This for the reason that in Texas, as in many other states, an insurance company by assuming and conducting the defense of a claim or action brought against its insured, with knowledge of facts which forfeit the coverage of the policy and without first effectively disclaiming liability, is thereafter precluded from defending an action on the policy and asserting no coverage on the basis of such facts.

In order to avoid this admittedly difficult choice of which course of action to pursue in the state court actions against its insured, Pacific contends that the injunction entered by the district court was "necessary in aid of its jurisdiction" to determine the question of policy coverage. Pacific further asserts that none of the decisions interpreting 28 U.S.C. §2283 or any of its statutory predecessors have ousted the equitable jurisdiction of a federal court to issue injunctions, including stays of state court proceedings, where necessary to afford a litigant before it complete relief and to prevent irreparable injury to the party seeking a temporary injunction.

We are constrained to reject Pacific's arguments and its interpretation of §2283. The Supreme Court, in the recent case of *Atlantic Coast Line R.R. v. Brotherhood of Locomotive Engineers*, ... U.S. ....., ... S. Ct. ....., 26 L. Ed. 2d 234 (1970), again had occasion

to construe the meaning of §2283. While the case involved a federal court injunction against the enforcement of a state decree enjoining union picketing, we view the Court's guidelines in the application of §2283 as controlling.

In *Atlantic, supra*, the Court made the following relevant observation:

> On its face the present Act [§2283] is an absolute prohibition against enjoining state court proceedings, unless the injunction falls within one of three specifically defined exceptions. The respondent here has intimated that the Act only establishes a 'principle of comity', not a binding rule on the power of the federal courts. The argument implies that in certain circumstances a federal court may enjoin state court proceedings even if that action cannot be justified by any of the three exceptions. We cannot accept any such contention. In 1954 when this Court interpreted this statue, it stated: 'This is not a statute conveying a broad general policy for appropriate *ad hoc* application. Legislative policy is here expressed in a clear-cut prohibition qualified only by specifically defined exceptions.' *Amalgamated Clothing Workers v. Richman Brothers*, 348 U.S. 511, 515-516 (1955). Since that time Congress has not seen fit to amend the statute and we therefore adhere to that position and hold that any injunction against state court proceedings otherwise proper under general equitable principles must be based on one of the specific statutory exceptions to §2283 if it is to be upheld. Moreover since the statutory prohibition against such injunctions in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction.
>
> ..... U.S. at .....

In construing the "necessary in aid of" phrase of §2283, the Court noted that,

> [I]f the District Court does have jurisdiction, it is not enough that the requested injunction is related to that jurisdiction, but it must be '*necessary in aid of*' that jurisdiction. While this language is admittedly broad, we conclude that it implies something similar to the concept of injunctions to 'protect or effectuate' judgments. Both exceptions to the general prohibition of §2283 imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case.
> .....U.S. at .....

And the Court concluded that:

> Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy. The explicit wording of §2283 itself implies as much, and the fundamental principle of a dual system of courts leads inevitably to that conclusion.
> .....U.S. at .....

Pacific Indemnity is not a party to the state court actions against its insured. Moreover, the question of coverage under the policy of insurance will not be litigated in those proceedings. The judgments rendered and the issues decided in the state court proceedings and authority to decide the question of coverage under the policy.

Pacific's apprehension, that it may waive its policy defenses if it defends the suits in the state court, furnishes no reason under §2283 to stay those proceedings.

Accordingly, and for the reasons above expressed, the judgment of the district court is REVERSED and the cause REMANDED with directions to dissolve the injunction.

APPENDIX F

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 28323

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellee,

versus

ACEL DELIVERY SERVICE, INC., et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING

(September 18, 1970)

Before RIVES, GEWIN and INGRAHAM, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

We note, in addition, the appellant's request that our opinion of August 6, 1970, be modified to provide that Pacific shall not be estopped to later deny coverage under the policy by defending the state court action against its assured. As authority for this requested reservation of rights, Pacific cites *Dairyland Insurance Co. v. Frith*, 419 F.2d 1325 (5th Cir. 1970), which contained language of the same import. In *Dairyland*, however, the court was exercising its equitable powers *under the particular facts of that case.* Under the facts presented in the instant case, we do not deem it appropriate to secure to Pacific the requested reservation of rights.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PACIFIC INDEMNITY COMPANY

vs.

ACEL DELIVERY SERVICE, INC., et al

CIVIL ACTION
NO. CA-3-3079-C

ORDER

On this the 18th day of July, 1969, came on to be considered the motion of Defendants Walter C. Talley and Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, to reconsider the injunction granted herein, and the Court being of the opinion that the same should be overruled,

IT IS THEREFORE ORDERED that the Motion to Reconsider Injunction of Defendants Walter C. Talley and Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, be and the same is hereby in all things overruled.

On this the 18th day of July, 1969, also came on to be considered the motion of Defendants Walter C. Talley and Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, to stay proceedings herein, and the Court being of the opinion that the same should be granted for a period of sixty days, so that said Defendants will not be prejudiced by the injunction granted herein on July 18, 1969, during the period necessary for an appeal from the order granting said injunction to be perfected to the Court of Appeals for the Fifth Circuit, and application made to that court for a stay of proceedings pending appeal.

IT IS THEREFORE ORDERED that the Motion to Stay Proceedings of Defendants Walter C. Talley and Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, be and the same is hereby granted for a period of sixty days commencing July 19, 1969, pending appeal by Defendants Walter C. Talley and Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, of the order entered herein on July 18, 1969, enjoining further proceedings in Cause No. 54709-C styled Sandra Talley, Administratrix of the Estate of Joe Mack Talley, Deceased, et al v. Estate of Wendell A. Williams, Deceased, pending in the 96th Judicial District Court of Tarrant County, Texas, in which suit Walter Talley is also a party plaintiff, and Cause No. 55526 styled Edward L. Baker, Jr. v. Wendell A. Williams, Deceased, et al, pending in the 17th Judicial District Court of Tarrant County, Texas, to the

Court of Appeals for the Fifth Circuit, and pending further orders of that Court extending the stay granted hereby.

ENTERED this 11th day of August, 1969.

/s/ W. M. TAYLOR, JR.
United States District Judge

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28323

PACIFIC INDEMNITY COMPANY,
Plaintiff-Appellee,

versus

ACEL DELIVERY SERVICE, INC., et al,
Defendants,

WALTER TALLEY and The Estate of Joe Mack Talley,
Defendants-Appellants,

Appeal from the United States District Court for the Northern District of Texas

Before GEWIN, DYER and CARSWELL,
Circuit Judges.

BY THE COURT:

The motion filed by appellants for summary reversal of the order of the United States District Court, in the captioned cause, is hereby DENIED.

The further motion of appellants for an expedited hearing and decision of this appeal is DENIED.

The alternative motion of appellants that this Court stay further proceedings in the District Court until this appeal is finally decided is GRANTED.

(Filed in U.S. Court of Appeals on September 24, 1969, Edward W. Wadsworth, Clerk)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-2118

D. C. Docket No. CA 3-3079-C

PACIFIC INDEMNITY COMPANY,

Plaintiff-Appellant,

versus

ACEL DELIVERY SERVICE, INC., ET AL,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, AINSWORTH and INGRAHAM, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

October 12, 1973

Issued as Mandate:

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

600 Camp St. - Rm. 102
New Orleans, La. 70130

December 7, 1973

Messrs. Spencer C. Relyea
Logan Ford
Attorneys at Law
1511 Fidelity Union Life Building
Dallas, Texas 75201

No. 72-2118 - Pacific Indemnity Co. vs. Acel Delivery Service, Inc., et al

MANDATE STAYED TO: January 6, 1974

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and order denying rehearing which are still required by the Supreme Court to be incorporated as an appendix to your petition.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Carol LeSage
Deputy Clerk

enc.

cc: Mr. Sam S. Stollenwerck
Mr. William C. Manning
Mr. Tom H. Davis
Mr. Norman W. Darvin
Mr. Henry W. Simon, Jr.